Filed 2/11/19 P. v. Jackson CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JANZEN GLYNN JACKSON, Defendant and Appellant.	B281578 (Los Angeles County Super. Ct. No. BA416362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Janzen Glynn Jackson killed his mother's boyfriend, Frank Herrera, during an altercation. He was charged with murder (Pen. Code,[1] § 187, subd. (a)), but convicted by the jury of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)). The trial court sentenced Jackson to the upper term of 11 years in state prison. (§ 193.)

Jackson contends the trial court erred in denying his *Batson/Wheeler*[2] motion challenging the prosecutor's exercise of peremptory challenges to two Black jurors. Jackson also asserts the trial court erred in admitting for impeachment the statements police officers obtained from Jackson in violation of his *Miranda*[3] rights, failing to instruct the jury on the lesser included offense of involuntary manslaughter, and denying his motion for a mistrial based on spectator misconduct. We affirm.

FACTUAL BACKGROUND

A. *Prosecution's Case*

1. *Jackson's visit with his family*

Jackson, who was a professional football player, lived outside California, but periodically came to Los Angeles to visit his family. During his visits, Jackson usually stayed with his uncle, Mark Williams (Mark),[4] and his cousin, Emeka Williams (Emeka),

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1 All statutory references are to the Penal Code.

2 *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).

3 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

4 Because some of the family members share the same last name, we refer to them by their first names in order to avoid confusion.

because he and Emeka were the same age. Sometimes Jackson stayed for a couple of days with his mother, Tesra Jackson (Tesra). Tesra lived with her boyfriend, Herrera, and her 16-year-old son, Royalle Bernstine, in an apartment in Santa Monica. Jackson generally got along with Herrera, but Bernstine frequently got into arguments with both Herrera and Tesra. On September 9 or 10 Jackson came to stay with Tesra, Herrera, and Bernstine.

On the morning of September 11, 2013 Bernstine left the apartment early to go to school. Tesra woke up at about 7:00 or 7:30 a.m., and got ready to leave for work. She told Jackson she could take him to Mark's apartment later that day. When she left between 8:00 and 8:30 a.m., Jackson was in the shower and Herrera was still asleep in their bedroom.

Emeka testified Jackson arrived with his belongings at Emeka's apartment at about noon on September 11. Emeka and Jackson spent the afternoon playing video games and watching television. Jackson slept on a couch in Emeka's room that night.

2. *Hererra's disappearance*

On September 11 Tesra arrived home between 3:00 and 3:30 p.m. No one was home. She sent a text message to Herrera to see if he had taken Jackson to Mark's apartment, but Herrera did not respond. Bernstine returned home at around 7:00 or 8:00 p.m.

Neither Herrera nor Jackson returned to Tesra's apartment that night or the following day. It was not unusual for Herrera to be out of contact for days at a time, but by September 13, Tesra began to worry about him. She tried calling and texting him, but his cell phone was disconnected. She called his work, but Herrera was not there. Herrera's employer testified he last saw Herrera on

September 10. Tesra did not call Jackson; she assumed he was at Mark's apartment.

3. *Discovery of Herrera's Body*

On the evening of September 14, 2013 Tesra took Bernstine to Mark's apartment to watch a boxing match. She and Bernstine saw Herrera's car parked on the street on the side of Mark's apartment building. When Tesra asked Emeka about Herrera, Emeka said he was not there. Tesra went outside and approached Herrera's car. It was getting dark and she could not see inside the car. But she noticed flies buzzing inside the car and a strong odor of decomposition coming from the open sunroof. She ran back into the apartment and telephoned Mark, who was not home. When Mark returned, he looked inside the car using a flashlight. He saw "a bundle of something, on the floor of the back seat" and "things on the back seat." At Tesra's request, he called the police.

Los Angeles Police Officer Ramon Barajas and his partner arrived at the scene shortly after 8:30 p.m. Using a flashlight, they looked inside the car and saw a pile of clothing on the back seat. They began removing items from the back seat. When they saw a pair of hands near the floor behind the front passenger seat, they secured the scene and called for backup.

Los Angeles Police Detective Michael Ventura arrived around midnight. He determined the car had not been driven recently based on the light coating of dust on the car. When the paramedics arrived, Detective Ventura directed them to check for a pulse. A paramedic moved a blanket to reveal Herrera's body, curled in a fetal position in the back seat with his face down.

4. *Removal of Herrera's body and the autopsy*

In the early morning of September 15, 2013 coroner investigator Kristy McCracken arrived at the scene, and observed Herrera's body on its side in the back seat of the car. Herrera's arms were bent at the elbows, with his hands resting behind the front passenger seat. His legs were bent at the knee, with both feet resting on the rear passenger seat. A blanket and sheet were tied with a data cord around his legs. Three cords were wrapped around Herrera's neck. An electrical cord attached to a fan was tied in a half knot around his neck. In addition, an electrical cord attached to a lamp was wrapped three times around his neck. A second data cord was tied in a double knot behind Herrera's neck. Herrera's body was in a moderate state of decomposition. McCracken and her forensic attendant removed Herrera's body from the car, took photographs, and transported the body to the coroner's office. There, McCracken and a criminalist removed the cords from Herrera's body and digitally fingerprinted him. She identified Herrera from his fingerprints.

The coroner, Dr. Kevin Young, conducted an autopsy on September 16, 2013. Dr. Young noted Herrera had a hemorrhage on his right temple, an abrasion above his right eyebrow, and a hematoma under his scalp, which were consistent with blunt force trauma. Herrera had abrasions on both elbows. His neck had a "ligature furrow," an indention in the skin caused by the cords tied tightly around his neck. He also had a fractured hyoid bone in his neck, which occurs in about 13 percent of ligature strangulations, although the bone also could have been fractured during the autopsy. Dr. Young opined Herrera's death was caused by ligature strangulation.

Dr. Young acknowledged the cords could have been placed after Herrera's death and the strangulation could have been

caused by a chokehold. Moreover, the ligature furrow could have occurred postmortem, when Herrera's body was placed in the car with the head lower than the body.

5. *The investigation and Jackson's arrest*

Los Angeles Police Detective David Torres obtained security camera footage from Tesra's apartment building for September 11, 2013. Footage from a security camera in the building garage showed Jackson enter the garage at 12:44 p.m., pulling a long cylindrical object towards Herrera's parking space. Jackson then returned to the parking garage elevator without the object. At 1:29 p.m. Jackson walked out of the garage elevator wearing a hat and a backpack, and carrying what appeared to be clothing. Another security camera footage showed Herrera's car leaving the parking garage at 1:31 p.m.

Detective Torres also obtained security camera footage from a business located across the street from Mark's apartment. It showed someone parking Herrera's car on the street at 3:03 p.m. on September 11. The person who exited the car wore a hat and a backpack, and had a striped shirt that matched what Jackson wore in the camera security footage from the apartment building.

On September 16, 2013 Detective Torres arrested Jackson at Tesra's apartment. Detective Torres observed no injuries to Jackson's face, arms, or hands. Detective Torres and two criminalists conducted an investigation of Tesra's apartment on September 19 and found no signs of a struggle.

B. *Defense Case*

1. *Jackson's testimony*

Jackson testified he came to Los Angeles on August 19, 2013 while on a break from playing football. Jackson initially stayed at

Mark's apartment. On September 9 he went to Tesra's apartment to stay for a few days. He had not had any issues with Herrera prior to this time, but he had not spent much time with him. He knew his mother had been having issues with Bernstine, who was a rebellious teenager. Jackson observed Bernstine and Herrera did not have any type of relationship.

That evening, Jackson was home alone with Bernstine. Bernstine told Jackson about an incident that occurred with Tesra and Herrera. Bernstine said Tesra gashed her hand, and Herrera then attacked Bernstine and tried to get him arrested.

Jackson asked Tesra about the incident the next day. She told him to talk to Herrera. Jackson was upset about the incident. Later that night Jackson and Herrera briefly discussed Bernstine, then Jackson and Herrera played video games before Jackson fell asleep on the couch.

On the morning of September 11, 2013 Jackson asked Tesra if she could drop him off at Mark's apartment. She said she had to go to work but would take him to Mark's apartment later. Jackson told Tesra he would try to get a ride with Herrera. He took a shower and went back to sleep. A short time later Jackson saw Herrera in the kitchen. Jackson grabbed his backpack from Bernstine's room, and asked Herrera to wait for him. Herrera inquired whether Jackson still wanted to talk about Bernstine. Jackson told Herrera what Bernstine told him, and Jackson and Herrera argued about the incident. Jackson told Herrera he was going to tell Mark and report the incident to the police. Herrera became agitated. Jackson told him to calm down, but Herrera kept asking, "What do you fucking mean?" Jackson turned to leave, but Herrera grabbed the left shoulder of Jackson's tank top and said, "No, you're fucking not." Jackson told Herrera twice to remove his hand before he grabbed Herrera's right hand to pull it

off his shirt. Herrera swung a punch at Jackson, but only grazed his chin.

Jackson moved backwards, and Herrera charged at him. Jackson threw punches, as Herrera attempted to punch him. Jackson thought he might have hit the side of Herrera's face. The fighting continued, and they both fell down. Jackson then kicked Herrera to get Herrera off him.

They stood up, and Jackson asked Herrera, "Are we good?" Jackson did not want to fight anymore. Herrera mumbled, "I'm going to get something for you," then headed toward Tesra's bedroom. Herrera started running, so Jackson chased after him. Herrera tripped over his feet and ran into a wall.

Jackson then chased Herrera into the kitchen. He thought Herrera was reaching for a knife on the kitchen counter, so he grabbed Herrera by the back of his shirt and punched him on the side of his head. Next Jackson placed his right arm around Herrera's neck and held him in a chokehold, while his left arm braced his right arm. He put one foot on the counter to push Herrera away. Herrera tripped over Jackson's leg and they fell down sideways onto the kitchen floor. When they fell, Jackson had the wind knocked of him, but managed to wrap his legs around Herrera. Jackson testified he continued to maintain the chokehold, squeezing Herrera's neck under the chin. He told Herrera to stop while Herrera tried to scratch his eyes and face. Jackson estimated he held Herrera in a chokehold for "[m]aybe a minute."

After Herrera stopped moving, Jackson slid out from underneath him because Jackson was tired and out of breath from the fight and from squeezing Herrera's legs and arms. Herrera's eyes were closed and he appeared unconscious. Jackson did not check to see if Herrera was still breathing. After Jackson got up,

he went to the bathroom and threw up. He then rested on the couch before leaving.

As Jackson was leaving, he noticed Herrera was still on the floor. Jackson checked on Herrera, who did not appear to be breathing. Jackson shook Herrera, but he did not know how to perform CPR. Jackson knocked on a couple of neighbors' doors, but no one answered. Jackson returned to the apartment and found a cell phone on Tesra's bed, but it was inoperable. Jackson was unable to call anyone, and was scared and frantic. Jackson did not intend to harm or kill Herrera.

Jackson decided to take Herrera's body to Mark's apartment because he did not want Tesra or Bernstine to come home and find the body. Jackson could not maneuver Herrera's body because Herrera's arms were flailing so he got a fitted bed sheet from Bernstine's bedroom and rolled the body up in it. He grabbed the lamp, fan, and cable cords and tied the cords around Herrera's ankles and neck. Then he took Herrera's body down to the parking garage, put it in Herrera's car, and drove to Mark's apartment. He parked the car on the street outside of Mark's apartment building.

Jackson did not contact the police because he wanted Mark to help him when he talked to them. But when Mark came home later that day, Jackson did not tell Mark what happened because he was scared. He also did not tell Tesra, but acknowledged he should have done so. He thought Tesra or someone else would recognize Herrera's car and ask him about it. Jackson stayed at Mark's apartment for several days, and no one noticed the car.

On September 14 Tesra and Bernstine arrived at Mark's apartment to watch a boxing fight. Tesra came running through the apartment door and asked Jackson and Emeka about Herrera's whereabouts. Tesra ran out of the apartment before

Jackson could say anything. Jackson testified, "I guess I was kind of relieved at that point, but I was still a little scared because I was going to have to confront the police." He testified he was not thinking. He stated, "I was thinking about going to jail for being responsible for killing [Herrera], and he had been outside in the car for three days, and I just basically let it snowball on me."

When Bernstine came into the living room, Jackson went outside and sat on a bench. He heard the ambulance or fire truck and left and went to Emeka's workplace. He stayed there for maybe an hour and 30 minutes before he returned to the apartment. Emeka and Bernstine were there, but he did not tell them what happened to Herrera. Jackson was arrested a couple of days later and taken to the police station.[5]

2. *Herrera's Violent Character*

Tesra testified as to several violent confrontations with Herrera. In 2011 or 2012, Herrera accused her of cheating, slapped her, and broke her cell phone by throwing it against the wall. Tesra thought Herrera had been drinking. In June 2013, after Tesra got into an argument with Herrera's daughter, Herrera pushed Tesra to the floor and choked her. Another time, Herrera came home from work with blood on his shirt and told Tesra he had stabbed someone with a screwdriver. Herrera also told Tesra he previously stabbed another person, had been in and out of "youth prison," and was formerly associated with a gang. Tesra attempted to end the relationship several times due to Herrera's

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[5] Jackson testified about the interrogation by detectives at the police station, which we discuss below in the context of whether his statements were voluntary.

drinking. He quit drinking, but started again several months before his death.

On the night of September 10, 2013 Tesra came home late, and Herrera, who had been drinking, yelled and cursed at her. Herrera left, but returned later that night. Tesra opined Herrera was violent, especially when he was drinking. Tesra testified, "It's my opinion that [Herrera] was somewhat unstable emotionally, and when he drank, it would bring out the worst in him."

Patricia Wootensanford, who was previously in a romantic relationship with Herrera, testified that on December 27, 2011, after the relationship had ended, Herrera showed up at her home. Herrera grabbed her cell phone and ran out of her apartment. Her date arrived but left when he saw Herrera with her. Before Wootensanford returned to her apartment, Herrera grabbed her by the throat and choked her for five to 10 seconds. She eventually called the police after Herrera passed out because he was drunk. She declined to press charges, and they continued dating on and off until 2013.

The trial court took judicial notice of Herrera's prior conviction on March 21, 1990, which included two counts of robbery, one count of kidnapping for the purpose of robbery, and gun enhancements on all three counts.

C. *Rebuttal Testimony*

Detective Torres testified about his interrogation of Jackson, and the prosecutor played portions of the audio recording of the interrogation. Detective Torres searched arrest and gang records, but he did not find anything indicating Herrera was a gang member or affiliated with a gang. Herrera had a juvenile arrest, but it did not lead to a sustained petition.

DISCUSSION

A. *Substantial Evidence Supports the Trial Court's Denial of Jackson's* Batson/Wheeler *Motion*

1. *Applicable law*

Jackson, who is Black, contends the trial court erred in denying his *Batson/Wheeler* motion, arguing the prosecutor failed to rebut Jackson's prima facie showing the prosecutor's exercise of peremptory challenges to excuse two Black prospective jurors was based on race, and deprived him of his federal constitutional right to equal protection (*Batson, supra*, 476 U.S. at p. 88) and state constitutional right to a trial by a jury drawn from a representative cross-section of the community (*Wheeler, supra*, 22 Cal.3d at pp. 276-277). As a result of the prosecutor's challenges, the jury panel that tried Jackson's case included only one Black juror.

"'[A] party may exercise a peremptory challenge for any permissible reason or no reason at all' [citation] but 'exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of the laws" [citations]. Such conduct also 'violates the right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16, of the California Constitution.'" (*People v. Smith* (2018) 4 Cal.5th 1134, 1146 (*Smith*); accord, *People v. Winbush* (2017) 2 Cal.5th 402, 433 (*Winbush*) ["Both state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based on their race or membership in a cognizable group."].) "'The "Constitution forbids striking even a single prospective juror for a discriminatory purpose."'" (*People v. Hardy* (2018) 5 Cal.5th 56, 76 (*Hardy*); accord, *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*) ["Exclusion of even one

prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal."].)

A three-step procedure governs the analysis of *Batson/Wheeler* claims. (*Smith, supra*, 4 Cal.5th at p. 1147; *Winbush, supra*, 2 Cal.5th at p. 433.) "'First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria,'" such as race. (*Smith*, at p. 1147; accord, *Hardy, supra*, 5 Cal.5th at p. 75; *Winbush,* at p. 433.) "'Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge.'" (*Smith*, at p. 1147; accord, *Winbush*, at p. 433 ["'[I]f the showing is made, the burden shifts to the prosecutor to demonstrate the challenges were exercised for a race-neutral reason.'"].) "[T]he prosecutor 'must provide a "'clear and reasonably specific' explanation of his [or her] 'legitimate reasons' for exercising the challenges." [Citation.] "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.'" (*Winbush*, at p. 434; accord, *Hardy*, at p. 76.) "'Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination.'" (*Smith*, at p. 1147; accord, *Hardy*, at p. 75 [same]; *Gutierrez, supra*, 2 Cal.5th at p. 1158 ["In order to prevail, the movant must show it was "'more likely than not that the challenge was improperly motivated.'"'"].) """The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]."'" (*Smith*, at p. 1147; accord, *Winbush*, at p. 433.)

Here, the trial court found Jackson made a prima facie showing the prosecutor exercised the peremptory challenges based on race, which the People do not challenge. When a trial court finds that a defendant has made a prima facie showing, "the adequacy of the prima facie showing becomes moot [citations], and the reviewing court skips to the third stage to determine whether the trial court properly credited the prosecutor's reasons for challenging the prospective jurors in question [citations]." (*Smith, supra*, 4 Cal.5th at p. 1147; accord, *Winbush*, *supra*, 2 Cal.5th at p. 434.)

In the third *Batson/Wheeler* stage, """the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."""" (*Smith, supra*, 4 Cal.5th at p. 1147; accord, *Winbush*, *supra*, 2 Cal.5th at p. 434.) "'The inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how objectively reasonable they are.'" (*Hardy, supra*, 5 Cal.5th at p. 76; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1158 ["This . . . inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness."].)

"'[O]ne form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination' is a comparison of the treatment of an excused juror with other similarly situated jurors. [Citation.] '[E]vidence of comparative juror analysis must be considered . . . even for the first time on appeal if relied upon by the defendant [if] the record is adequate to permit the urged comparisons.' [Citation.] But when, as here, a defendant 'wait[s] until appeal to argue

comparative juror analysis,' our 'review is necessarily circumscribed,' and we 'need not consider responses by stricken panelists or seated jurors other than those identified by the defendant.'" (*Smith, supra*, 4 Cal.5th at pp. 1147-1148; accord, *Hardy, supra*, 5 Cal.5th at p. 77 ["'When comparative juror arguments are made for the first time on appeal, . . . the reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable.'"]; *People v. Lenix* (2008) 44 Cal.4th 602, 607 (*Lenix*) ["Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons."].)

"'"'"[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."'"'"' (*Smith, supra*, 4 Cal.5th at p. 1147; accord, *Lenix, supra*, 44 Cal.4th at pp. 627-628 [same]). "'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses.'" (*Winbush*, *supra*, 2 Cal.5th at p. 434; accord, *Hardy, supra*, 5 Cal.5th at p. 76.) '"'"Although we generally 'accord great deference to the trial court's ruling that a particular reason is genuine,' we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." [Citation.] "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." [Citation.]

However, we also have stated that a trial court is not required "to make explicit and detailed findings for the record in every instance in which the court determines to credit a prosecutor's demeanor-based reasons for exercising a peremptory challenge."'" (*Hardy, supra*, 5 Cal.5th at p. 76-77; accord, *Smith, supra*, 4 Cal.5th at p. 1147 ["'[I]n reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, we typically defer to the trial court and consider only "whether substantial evidence supports the trial court's conclusions."'"]; *Gutierrez, supra*, 2 Cal.5th at p. 1159 ["When a reviewing court addresses the trial court's ruling on a *Batson*/*Wheeler* motion, it ordinarily reviews the issue for substantial evidence."].)

2. *The Challenged Jurors*

The prosecutor exercised peremptory challenges to excuse two of three prospective Black jurors seated in the jury box at the time of his challenges, R.W. and Deloris G.

a. Prospective juror R.W.

R.W. was a teacher and single mother of a three-year-old boy. She had some family members who had been arrested or served time. Her brother had been arrested for domestic violence against his girlfriend eight or nine years earlier. R.W. stated the police sided with his girlfriend and "reprimanded" him even though both were at fault. However, that situation would "probably not" affect her impartiality.

R.W. said it was "bothering" her that there were "a few bad apples" among police officers. She added that in light "of the events that have been occurring recently in America over the last couple years, I am starting to [lose] faith in [the impartiality] in our system. . . . [O]ne of the situations that bothered me the most

is the Sandra B[l]and situation." R.W. described Bland as an "African-American woman who kind of like me, working, educated and got arrested and never seen her family again. And that could have been me so, I am starting to feel uncomfortable." When the trial court asked R.W. whether she could set aside her views and be fair and impartial, she responded, "I can't guarantee that." The trial court later inquired again whether R.W.'s views on what was happening in the world would affect her impartiality. R.W. responded, "[I]t could possibly just because there are so many who are abusing their power in this day and age. And it makes me sad especially with me having an African-American son who I have to explain this to . . . ." She said she would "try" to be impartial, she "just can't guarantee it."

When the prosecutor inquired of R.W. whether there were any other cases that made her feel the justice system was not working well, she responded, "Turn on your TV. Every day it's something, almost every single day, and it's heartbreaking." When asked whether she could be fair in listening to police officers testify, she said as to the officers, "if [they] want him to be guilty, he's going to be guilty." Further, "in many cases, when there's law enforcement involved, . . . [i]t's just automatically guilty." When the prosecutor asked R.W. whether it would be difficult for her to be fair and impartial toward the prosecution, she responded, "Probably . . . . Especially now that I learned that he's African-American. I didn't know what he was at first, and now I'm starting to feel . . . even in more shock."

b. Prospective juror Deloris G.

Deloris G. was a retired children's services supervisor, was married to a truck driver, and had one adult son who previously worked in construction. Deloris G.'s brother had been arrested

and sent to prison for drugs. Her stepson went to prison for attempted murder, and a second time for transporting drugs across state lines. Deloris G.'s son had been arrested three times for driving under the influence and went to jail once for domestic violence. He was currently in jail for allegedly pimping and pandering. The son's probation officer told Deloris G. the police had contacted her to request she pursue a probation violation instead of the prosecutor filing new charges against the son. The probation officer "felt like they didn't have enough evidence to really arrest him." Deloris G. believed her son was not treated fairly. She added, "[A]fter that, I just have a problem with police officers. I mean, their job is to protect and serve, and then if you're going to, you know, only protect and serve certain people—it's just so much going on here lately with police officers and minorities, and it—it just kind of bothers me. [¶] And then with me having a son—he's going through some issues—it just—it bothers me and worries me."

Deloris G. also stated as to police officers, "Just like what's on the news right now; you know the incident—I can't recall what state it's in—where the guy was—the police that stopped him and—and he took off running. True enough, he shouldn't have ran, but the police shot him five times in the back. And he dropped a taser over by him so—and now it's a hung jury? That's just not right. It's just not right. It's just too much, too much going on right now." The prosecutor noted, "For the record, this particular juror is very emotional about the fact that there was a hung jury where the officer is the one that was being prosecuted. [¶] Isn't that correct?" Deloris G. responded, "Yes." The prosecutor asked, "So based on all of that, do you think that you could be a fair juror towards the prosecution?" Deloris G. responded, "I would make every effort, yes. I would make an effort

to, yes." She added, "but, I mean, still that's in the back of my head."

3. *Defense counsel's* Batson/Wheeler *motion and the trial court's ruling*

The prosecutor initially challenged prospective juror R.W. for cause. The trial court denied the challenge. The prosecutor later used his fourth peremptory challenge to excuse R.W. Defense counsel did not at this time make a *Batson/Wheeler* motion.

Deloris G. was later seated in the jury box. Following her voir dire, the prosecutor challenged her for cause. After the trial court denied the challenge, the prosecutor exercised his 10th peremptory challenge to excuse her. At this point, defense counsel brought her *Batson/Wheeler* motion with respect to both R.W. and Deloris G.

The prosecutor stated two reasons for excusing R.W. First, R.W. had family members who had been arrested or served time, including her brother who was charged with committing domestic violence against his girlfriend. Second, he raised her inability to be fair and impartial in light of the Sandra Bland incident and events in America. He also argued she could not be fair with law enforcement.

The prosecutor next gave three reasons for challenging Deloris G. The prosecutor noted that she believed her son was unfairly treated by the police; she was emotional that there was a hung jury in the trial against the police officer who shot a Black man in his back as he ran from the officer; and her stepson had been sent to prison for attempted murder. The prosecutor argued, "So that in conjunction with all the other factors that she mentioned, the People didn't feel that she could be fair towards the

prosecution."

Defense counsel responded as to both R.W. and Deloris G. that with "[w]hat's going on in our country right now, if we were to kick off every person that's being honest about that, we would never get any African-Americans on a jury."

The trial court denied the motion, finding the "People's reasons given to the court are race-neutral . . . and sincerely made." The trial court added as to the composition of the jury that a Black female juror remained on the jury and defense counsel previously excused a juror who appeared to the court to be a Black male.

4. *The record supports the trial court's conclusion the prosecutor's justifications for exercising his peremptory challenges were race-neutral and sincerely made*

Jackson contends the prosecutor's justifications for striking R.W. and Deloris G. were based solely on an assumption that as Black jurors they would be biased against the prosecution due to media coverage of police misconduct. However, both R.W. and Deloris G. believed their family members had been treated unfairly by law enforcement. R.W.'s brother had been arrested for domestic violence eight or nine years earlier. She felt both her brother and his girlfriend were at fault, but only he was "reprimanded." In addition, two family members were serving time for various crimes. Deloris G. likewise had multiple family members who had been incarcerated. Her brother was incarcerated for a drug-related offense. Her stepson went to prison for attempted murder, and a second time for transporting drugs across state lines. Deloris G.'s son had been arrested three times for driving under the influence and went to jail once for domestic violence. He was currently in jail for allegedly pimping

and pandering. Significantly, she felt her son was not treated fairly after hearing from his probation officer that the police wanted her to pursue a probation violation, but she declined because she felt the officers did not have enough evidence to arrest him. Based on her son's experience, she had "a problem with police officers," and noted there is "just so much going on here lately with police officers and minorities, and it—it just kind of bothers me." R.W.'s and Deloris G.'s negative experiences with law enforcement are valid bases for striking them. (*Hardy, supra*, 5 Cal.5th at p. 82; *Winbush, supra*, 2 Cal.5th at p. 441.)

In addition, both R.W. and Deloris G. were distrustful of the criminal justice system. R.W. described law enforcement as having "a few bad apples" and, in light of recent events in America, she was "starting to [lose] faith in [the impartiality] in our system." R.W. expressed concern that a Black woman covered in the news, Sandra Bland, was falsely arrested and has "never seen her family again." She added, "that could have been me so, I am starting to feel uncomfortable." When asked by the trial court if this would affect her impartiality, R.W. responded, "It could possibly." She added, ". . . I have to figure out a way to move past it, but it is not today." When the prosecutor asked whether it would be difficult for her to be fair and impartial toward the prosecution, R.W. replied, "[p]robably," and later, "I think so."

Deloris G. similarly expressed concern about police misconduct reported in the news, describing an incident where a police officer shot a Black male five times in the back after he was stopped by the police and ran. She emotionally stated as to the hung jury in the trial of the police officer, "That's just not right. . . . It's just too much, too much going on right now." However, in response to the prosecutor's inquiry as to whether she could be

fair, Deloris G. stated, "I would make every effort, yes," then added, "but, I mean, still that's in the back of my head."

R.W.'s and Deloris G.'s "[s]kepticism about the fairness of the criminal justice system to indigents and racial minorities has . . . been recognized as a valid race-neutral ground for excusing a juror." (*Winbush, supra*, 2 Cal.5th at p. 439; accord, *Smith, supra*, 4 Cal.5th at p. 1153 [challenge to juror who stated her belief that "'the system is not always fair, [and] sometimes race seems to play a part'" was race-neutral reason]; *Hardy, supra*, 5 Cal.5th at p. 81 ["'A prospective juror's distrust of the criminal justice system is a race-neutral basis for his [or her] excusal.'"]; *People v. Calvin* (2008) 159 Cal.App.4th 1377, 1388 ["The fact that similar [skeptical] attitudes are held by many other African-Americans does not convert the prosecutor's challenge into intentional race-based discrimination."].)[6]

Jackson contends a comparative juror analysis of four other

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[6] On December 7, 2018 Jackson submitted a letter citing to *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1172-1176 (*Douglas*) in support of his *Batson/Wheeler* contentions. In *Douglas*, the prosecutor exercised his peremptory challenges to excuse two openly gay prospective jurors. (*Id.* at pp. 1166-1167.) Although the court observed the prosecutor had facially valid reasons for challenging the jurors, it concluded the prosecutor's explanation that he excused the jurors based on his assumption they might be biased against the closeted victim (the main witness) reflected invidious sexuality discrimination, where both prospective jurors said they could be fair and did not express concerns about closeted homosexuals. (*Id.* at pp. 1170-1172.) Unlike the two prospective jurors in *Douglas*, R.W. stated it would be difficult for her to be fair and impartial to the prosecution. Deloris G. had hesitation about whether she could be fair, and harbored a distrust of the criminal justice system.

jurors demonstrates the prosecutor's reasons for striking R.W. and Deloris G. based on their family members' arrests or imprisonment were not credible. He argues Juror No. 0181[7] indicated her father had been falsely arrested and questioned about a murder, but the prosecutor did not excuse her. However, the father was not charged with murder, and when the prosecutor asked the juror whether that experience would affect her ability to be fair and impartial, she responded, "No. I just think—sometimes I think back on it, and I'm kind of wondering why they just didn't question him."

Jackson also points to Juror No. 4010, who stated she and her family members were arrested for driving under the influence. But Jackson concedes the juror stated the arrests would not affect her in the trial. Juror No. 3059 indicated his uncle had been arrested for domestic violence, but he stated he would not harbor any bias for or against either side based on his uncle's domestic violence arrest.

As to Juror No. 6116, whose ex-boyfriend had been arrested and was on probation, when asked whether there was anything about the ex-boyfriend's arrest that would affect her in Jackson's trial, she responded, "No, not at all." When asked whether she could give both sides a fair trial, she responded, "I will do my best." Jackson also acknowledges the prosecutor struck three other potential jurors who had been arrested or whose family members

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[7] We refer to the jurors in the comparative juror analysis by the last four digits of their badge numbers because the parties refer to them by different juror numbers. Although the trial court referred to the jurors by assigned numbers, each time a juror was excused, the next prospective juror who took the juror's seat assumed the number of the juror who was excused.

had been arrested.

Unlike R.W. and Deloris G., these four jurors did not raise concerns about police misconduct against minorities or express skepticism of the fairness of the criminal justice system. Neither did they believe their family members were treated unfairly by the police. In addition, these jurors stated they would be fair and impartial to both sides. By contrast, R.W. stated it "[p]robably" would be difficult for her to be fair and impartial toward the prosecution, and Deloris G. made clear her concerns would remain in the back of her head. As the Supreme Court explained in *Winbush*, "Pretext is established . . . when the compared jurors have expressed 'a substantially similar *combination* of responses,' in all material respects, to the jurors excused." (*Winbush, supra*, 2 Cal.5th at p. 443 [although prosecutor accepted some jurors who, like those he struck, believed the criminal justice system was unfair to minorities, this did not support an inference of discriminatory motive where the prosecutor gave reasonable explanations for why the seated jurors were more favorable than the excused jurors]; accord, *Hardy, supra*, 5 Cal.5th at p. 77 [Compared jurors "'must be materially similar in the respects significant to the prosecutor's stated basis for the challenge.'"].) Here there were significant differences between the two challenged prospective jurors and the four jurors who remained on the panel.

Finally, relying on *Gutierrez*, Jackson contends the trial court failed to make a sincere and reasoned evaluation of the prosecutor's justification. While the trial court should have explained its reasoning, "[a] sincere and reasoned evaluation of the prosecutor's stated reasons does not, in every circumstance, require the court to make detailed comments on every such reason." (*Smith, supra*, 4 Cal.5th at p. 1158; accord, *Gutierrez,*

supra, 2 Cal.5th at p. 1171 ["Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication."].)

In *Gutierrez*, the prosecutor explained he excused a Hispanic prospective juror who lived in the City of Wasco because she was not aware of gang activity in the area. (*Gutierrez, supra*, 2 Cal.5th at pp. 1168-1169.) The record of voir dire did not show why the prospective juror's "*unawareness* of gang activity in Wasco would indicate a bias against [the prosecution witness who was] a member of a gang based in Wasco." (*Id.* at p. 1169.) Further, the prospective juror's "responses did not evince a manifest predisposition to disbelieve or dislike" the Wasco gang member who would be testifying. (*Id.* at p. 1170.) Here, as discussed above, the prosecutor's justifications for excusing R.W. and Deloris G. were supported by specific reasons based on their distrust of the criminal justice system and police officers. The trial court properly considered the prosecutor's reasons as a whole, and did not err in concluding the reasons were race-neutral and sincerely held. (*Smith, supra*, 4 Cal.5th at p. 1158.)

B. *Jackson's Statements Were Admissible as Impeachment Evidence*

1. *Applicable law*

Although statements obtained in violation of *Miranda* cannot be introduced by the prosecution in its case-in-chief, they may be used as impeachment evidence, provided the statements are not obtained by coercion. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1076-1078 [defendant's statements obtained during interrogation after he requested an attorney could be used for impeachment even though police officer deliberately elicited statements for that purpose because officer's questioning was not

"overbearing or otherwise coercive"]; *People v. Peevy* (1998) 17 Cal.4th 1184, 1193-1196, 1204-1205 [voluntary statement was admissible as impeachment evidence even though officer deliberately violated *Miranda* by intentionally continuing to interrogate defendant after he invoked his right to counsel]; cf. *People v. Neal* (2003) 31 Cal.4th 63, 67 (*Neal*) [defendant's confessions inadmissible for all purposes where detectives intentionally continued interrogation of defendant despite his nine requests to speak to an attorney, badgered him, and held him in custody overnight without food, water, or toilet facilities before he confessed].)

A defendant's statement is involuntary if, based on the totality of the circumstances, his or her will was overborne by coercive police conduct. (*People v. Spencer* (2018) 5 Cal.5th 642, 672 ["In determining whether a confession is involuntary, we consider the totality of the circumstances to see if a defendant's choice to confess was not """"essentially free""""" because his will was overborne by the coercive practices of his interrogator."]; *Winbush, supra*, 2 Cal.5th at p. 452 [same].) A suspect's statements are "not 'essentially free' when a suspect's confinement was physically oppressive, invocations of his or her *Miranda* rights were flagrantly ignored, or the suspect's mental state was visibly compromised." (*Spencer*, at p. 672.)

Statements obtained in violation of *Miranda* do not show coercion unless the police deliberately continue to question the defendant after the defendant has invoked his or her *Miranda* rights in a manner that "undermine[s] a defendant's free will by signaling that 'no' is not an acceptable answer." (*People v. Case* (2018) 5 Cal.5th 1, 24-25 (*Case*); accord, *Neal, supra*, 31 Cal.4th at p. 82 ["From the fact of defendant's resistance, and [the officer's] overcoming of his resistance, we may infer that defendant received

the message that [the officer] would not honor defendant's right to silence or right to counsel until defendant confessed."].) In addition, "'[a] confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.'" (*People v. Wall* (2017) 3 Cal.5th 1048, 1066 (*Wall*); accord, *Neal*, at p. 84 ["Promises and threats traditionally have been recognized as corrosive of voluntariness."].)

The People have the burden of establishing the statements were voluntarily made by the defendant. (*Wall, supra*, 3 Cal.5th at p. 1066; *People v. Peoples* (2016) 62 Cal.4th 718, 740.) We review a statement's voluntariness de novo; we review the trial court's factual findings for substantial evidence. (*People v. Wall*, at p. 1066; *Winbush, supra*, 2 Cal.5th at p. 452; *Neal, supra*, 31 Cal.4th at p. 80.) "In reviewing the trial court's determinations of voluntariness, we apply an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]" . . . .'" (*Neal*, at p. 80.)

2. *The interrogation*

At 3:30 p.m. on September 16, 2013 Los Angeles Police Detectives Torres and Calzadillas began interrogating Jackson at the police station. During the first interview, the detectives advised Jackson of his *Miranda* rights. Jackson indicated he understood he had "the right to [the] presence of an attorney before and during any questioning." He stated, "Yes. After I do this, can I ask for that right?" Detective Torres answered, "You can ask for anything you want." After Jackson acknowledged he understood his *Miranda* rights, Detective Torres asked him how long he had known Herrera. Jackson responded, "It's been a while

but I [want to] exercise my right. My . . . my third right." Detective Torres inquired, "What's your third right?" Jackson replied, "[T]he third one right there. For the attorney." Jackson told the detectives that Chris Darden was his attorney. Detective Torres asked, "You had an attorney before we even talked to you?" Jackson explained he, his mother, and his uncle went to the attorney's office the prior day. Detective Calzadillas asked, "Why would you go talk to an attorney if you didn't know we wanted to talk to you?" Jackson answered, "I was there with my mom and my uncle and them."

Jackson told the detectives his uncle said he did not have to talk to the police. Detective Torres responded, "You have the right not to talk to us if you don't want to talk to us." Jackson stated, "Oh, I know that. That's what I'm saying. I was just talking because, you know, [Herrera is] missing." Detective Torres told Jackson, "If you want to talk to us about what you know about [Herrera] then you can." Detective Torres added, "I mean—and then any time you want to stop talking you stop talking. But if you want a lawyer you can get a lawyer. It's your choice." Detective Calzadillas stated, "That's where we're at. We just want to talk about [Herrera]. That's it."

After Jackson answered a question about his mother's zip code, Detective Calzadillas asked, "When's the last time you saw [Herrera]?" Jackson indicated he had not seen Herrera for a couple of days since Herrera went missing. After some more questioning, Jackson stated, "I'm hoping to go home." Detective Torres said, "Well, that's not going to happen." Jackson responded, "If not, I just want to talk to my attorney." Detective Torres told Jackson, "You can use the phone to call him." Detective Torres reiterated, "All right, man. Just hang tight for a second and we'll get you a [p]hone." But the detectives did not

provide Jackson with a telephone, instead leaving him in the interview room. The interview room did not have water, a toilet, or a telephone.

As the trial court later found, after an hour and a half passed, Jackson knocked on the glass where Detective Calzadillas was working, and stated he wanted to talk to the detectives. The detectives then conducted a second interview at 5:02 p.m. Detective Torres began the interview by stating, "Calzadillas came over and said that I was out reviewing paperwork waiting for your mom to get here. He said that uh . . . you knocked on the door and you wanted us to come back and wanted to talk to us?" Jackson replied, "Yeah." Detective Torres stated, "We read you your rights and earlier you said hey I don't want to talk to you guys but . . . ." Jackson interjected, "Yeah." Detective Torres asked, "Nobody is making you do this. You want to talk to us?" Jackson answered, "Yeah, I want to talk." Detective Torres queried, "Ok. What do you want to talk about?" Jackson said, "Well, I just . . . Really I want to talk because, I'm really getting a little upset stomach . . . and uh . . . but . . . anyways . . . ." Detective Torres asked, "You getting an upset stomach?" Jackson responded, "Yeah. Like, I need to use the restroom." Detective Torres said, "Ok. Ok."

Jackson then immediately changed the subject and stated, "Yeah, and um . . . I was thinking that an attorney was different from a lawyer." Detective Torres explained, "It's just [two] different names for the same thing." Jackson stated, "Oh. I got you. Because my uncle told me before that y'all can't comment that uh . . . that I should say that I need to talk to my attorney but you know what I'm saying, I haven't done anything wrong so I . . . I don't see no . . . reason for me to." Detective Torres asked, "Okay you want to talk to us without an attorney right?" Jackson replied, "Yeah." Detective Calzadillas told Jackson, "That's your

choice." Detective Torres added, "That's what we told you earlier when we were talking to you . . . is, it's up to you." Jackson responded, "I got you. I got you."

At this point Detective Torres said to Jackson, "We're here is, we're trying to figure out where Frank is. Ok? You kind of know that. That's what it's about[,] right?" Jackson told the detectives he last saw Herrera the previous Wednesday or Thursday at Tesra's apartment in Santa Monica. That morning Jackson told Tesra he wanted to go to his uncle Mark's house. Tesra said he could wait for her or he could have Herrera take him there. Tesra left with Bernstine to take him to school. After Herrera woke up around 11:30 a.m. and used the bathroom, he asked Jackson if he was ready and they left the apartment together. Jackson said they went to Herrera's car in the apartment building garage. Herrera drove them to a gas station and got Jackson a deli sandwich. Afterwards, Herrera dropped Jackson off in front of Mark's house before driving to work. The detectives told Jackson they knew his story was not true and informed him that Herrera was dead. Jackson repeatedly denied knowing what happened to Herrera.

Jackson did not again raise a concern about using the bathroom until the end of the second interview, at which time Jackson told the detectives, "Y'all, my stomach is killing me." Detective Torres asked, "You need to go? We can take you." Jackson repeated, "My stomach is killing me." Detective Torres told him, "Do you know why your stomach is killing you? [Be]cause stress." The detectives continued brief additional questioning of Jackson, then Jackson stated, "I don't know what happened to Frank, y'all." Jackson continued to deny any knowledge of what happened to Herrera, and added, "I know [Herrera] went to my uncle Mark's. [Herrera] dropped me off."

After further denials, Detective Torres asked again, "You need to go to the bathroom?" Jackson responded, "Yeah. [¶] I think I'm gonna call my attorney, too." He added, "I need to call my attorney or my uncle." Detective Calzadillas asked two more questions, first, "Do you have any explanation why this video is going to show something totally different from what you're saying?" Jackson replied, "No, sir." Detective Calzadillas followed up, "You have no explanation for it?" Jackson responded, "No sir." It was at this point the detectives ended the second interview, at 6:05 p.m., and Jackson left the interview room to use the bathroom.

After Jackson used the bathroom, the detectives conducted a third interview at 6:10 p.m. The detectives showed Jackson a still photograph from a surveillance video depicting him dragging a large bundle with a fan wrapped around it. Jackson said he was pulling a large suitcase with weights inside as a leg workout. Shortly after, Jackson requested to speak with his attorney. The detectives then concluded the interrogation.

3. *Jackson's motion to suppress and the trial court's ruling*

Prior to trial, Jackson moved to exclude his statements made to Detectives Torres and Calzadillas on the basis the statements were obtained in violation of his *Miranda* rights. The trial court granted Jackson's motion to exclude the statements in the prosecutor's case-in-chief, finding Jackson's statements were obtained in violation of his Fifth Amendment rights pursuant to *Miranda*. The court found, "Under the totality of circumstances, [Jackson] unambiguously invoked his right to counsel; therefore, any further questioning should have ceased." But the court allowed the prosecutor to use the statements for impeachment because "[i]t does not appear to the court that the detectives

blatantly disregarded *Miranda*." The trial court added, "The facts of this case are not similar and not as egregious as those in *Neal*."

4. *Use of Jackson's statements at trial*

At trial, Jackson testified on direct examination that, after he was arrested and taken to the police station, he told the detectives he wanted to speak with an attorney, "like three or four times." Jackson explained the detectives told him they were going to get him a phone, but he waited in the interview room for what seemed like a long time. He needed to use the bathroom, so he knocked on the door and told them, but they did not let him use the bathroom. Jackson testified, "I didn't know I could just tell them that I don't want to—that I don't want you-all to talk to me. I know that I could tell them I didn't want to talk, but they kept talking to me, so I didn't know I could tell them to stop talking. So I was just answering their questions, and I ended up telling them a bullshit story." He said he lied and told the detectives a "stupid story" in the hope of being allowed to leave the room.

At the close of the defense case, the trial court heard argument from counsel on whether Jackson's testimony opened the door to introduction of portions of the audio recording of the interrogation to show whether the interrogation was coercive. The trial court found Jackson's testimony created "the impression that anything that he said to the police officers was involuntary and coercive," and allowed the prosecutor to use the audio recording of Jackson's statements as impeachment to show the statements were voluntary and not coerced. The trial court explained Jackson's direct testimony left the impression "he couldn't tell the truth because he wanted an attorney and wanted to use the bathroom, it shows coerciveness."

During Detective Torres's rebuttal testimony, the prosecutor played the portion of the interrogation that showed the detectives advising Jackson of his *Miranda* rights and Jackson's invocation of his right to counsel during the first interview. The jury also heard the beginning of the second interview leading up to Jackson's agreement to speak with the detectives without an attorney present. Detective Torres testified that about an hour and a half after the first interview ended, he was doing paperwork when Jackson knocked on the door. He also acknowledged there was no bathroom in the interview room. The second interview lasted a little more than an hour.

5. *Jackson's statements were voluntary*

Jackson contends the statements he made during the September 16, 2013 interrogation were involuntary, and he was prejudiced by their admission as impeachment evidence.[8] His principal contention is that the detectives' continued questioning of him after he invoked his right to counsel was similar to the conduct of the police officers the *Neal* court concluded was coercive.

In *Neal*, a police officer interrogated the defendant while in custody "in deliberate violation of *Miranda* in spite of defendant's repeated invocation of both his right to remain silent and right to counsel—indeed . . . defendant *nine times* requested to speak with

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[8] Although the trial court did not allow the prosecutor to play the portion of the taped interrogation in which Jackson stated falsely that Herrera had dropped him off at Mark's apartment and was alive when Jackson last saw him, Jackson admitted he lied to the detectives and made up a "bullshit story" only after the trial court ruled his statements could be used for impeachment.

an attorney. Furthermore, the officer . . . not only continued the questioning improperly but badgered defendant, accusing him of lying, and informing defendant that 'this is your one chance' to help himself and that 'if you don't try and cooperate . . . , the system is going to stick it to you as hard as they can.'" (*Neal, supra*, 31 Cal.4th at p. 68.) The detective admitted "he intentionally continued [the] interrogation in deliberate violation of *Miranda* in spite of defendant's invocation of both his right to remain silent and right to counsel . . . in order to obtain a statement that the People might use '[f]or possible further impeachment at trial . . . if [defendant] decided to testify.'" (*Id*. at p. 74.)

Further, in *Neal*, after the first interrogation ended, the officers placed the defendant in a jail cell overnight with no food, drink, or toilet facilities. Neither did he have access to an attorney. (*Neal, supra*, 31 Cal.4th at p. 73.) The following morning, the defendant asked to speak with the detective, and he provided two confessions at the two interviews that followed. (*Id*. at pp. 74-75.) It was only after the third interview that the defendant was provided food—24 hours after he was taken into custody and more than 36 hours since his last meal. (*Id*. at p. 76.)

The Supreme Court concluded, "[I]n light of all the surrounding circumstances—including the officer's deliberate violation of *Miranda*; defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on defendant during his confinement; and a promise and a threat made by the officer—defendant's initiation of further contact with the officer was involuntary, and his two subsequent confessions were involuntary as well. As a result, we conclude not only that those confessions were inadmissible in the People's case-in-chief because they were obtained in violation of [*Edwards v.*

Arizona (1981) 451 U.S. 477], but also that they were inadmissible for any purpose because they were involuntary." (*Neal, supra*, 31 Cal.4th at p. 68.)

Jackson acknowledges that, unlike the detective in *Neal*, Detective Torres did not expressly admit he was attempting to evade *Miranda* to obtain impeachment evidence. However, he contends the detectives' continued interrogation without access to a bathroom or food was an attempt to coerce Jackson into making a confession they could use for impeachment despite his earlier invocation of his right to counsel.

It is true the trial court in its written findings found the detectives questioned Jackson in violation of *Miranda*, and they left him in the interview room for about an hour and a half without access to a toilet, food, drink, or a telephone. It was after this time period that Jackson knocked on the glass to tell Detective Calzadillas he wanted to talk to the detectives. After Detective Torres advised Jackson that he was previously read his rights and he said he did not want to talk to the officers, Jackson said he wanted to talk because he had an upset stomach. Jackson added that he "need[ed] to use the restroom." However, after Detective Torres said, "Ok. Ok," it was Jackson who changed the topic by stating he thought an attorney was different from a lawyer, and that he did not see a reason to talk to an attorney because he had not done anything wrong. Then, in response to Detective Torres's inquiry whether Jackson wanted to talk to the detectives without an attorney, Jackson responded, "Yeah." The detectives proceeded to question Jackson for about an hour.

At no time did the detectives tell Jackson he could not use the bathroom unless he talked to them. As the trial court found, it was only toward the end of the second interview that Jackson again said his stomach really hurt and he needed to use the

bathroom. At this point, questioning briefly continued, then the detectives took Jackson to the bathroom. When Jackson returned, he answered some questions, then invoked his right to an attorney. The detectives asked two final questions, then the questioning stopped.

The facts here stand in contrast to those in *Neal*. In *Neal*, the detective deliberately continued to interrogate defendant notwithstanding his repeated invocation of his *Miranda* rights, conveying the message that the detective would not honor his requests until he gave a confession. (*Neal, supra*, 31 Cal.4th at p. 82; cf. *Case, supra*, 5 Cal.5th at p. 25 [finding no coercion where "the conduct of the interrogation did not communicate to defendant that detectives would not take 'no' for an answer"].) Here, nothing about the interrogation communicated that the detectives would not honor Jackson's *Miranda* rights unless he confessed. Although Jackson stated he had an upset stomach and wanted to use the bathroom, he then immediately changed the subject. Before the interview resumed, the detectives confirmed Jackson wanted to speak with them without an attorney. After Jackson stated he did, the detectives reminded him it was his choice whether to talk with them. Detective Calzadillas stated, "That's your choice." Detective Torres similarly stated, "It's up to you." Only then did the interview continue. In total, Jackson was without a toilet or water for two and a half hours while he was in the interview room; by contrast, the defendant in *Neal* was kept in jail overnight without food, drink, or toilet facilities. (*Neal*, at p. 68.)

Jackson also contends his statements were involuntary because the detectives threatened him that if he did not tell the truth, it would look bad if he later claimed self-defense. A statement is involuntary if it is the result of express or implied

threats or promises. (*Wall, supra*, 3 Cal.5th at p. 1066; *Neal, supra*, 31 Cal.4th at p. 84.) However, "'there is nothing improper in pointing out that a jury probably will be more favorably impressed by a confession and a show of remorse than by demonstrably false denials.'" (*Case*, *supra*, 5 Cal.5th at p. 26.)

During the second interview, the detectives told Jackson they knew Hererra was dead, and his story that Herrera drove him to Mark's house was a lie. Detective Torres stated, "And it comes back to why did this happen? Well, later on we're going to find out whatever reason it happened. You know, if it's because you're under pressure. You snapped. Whatever it was. If he pissed you off. Whatever it was. You were mad because he did something to your mom. Whatever it was we'll find out, but it's not going to mean a hill of beans. Why? Because you lied about it. You didn't want to tell the truth. So you're not truly remorseful. You know what I mean? You didn't feel for Frank."

Detective Torres's statements were an exhortation to Jackson to tell the truth. He explained if Jackson lied in the interview, he would not be believed later. "'Absent improper threats or promises, law enforcement officers are permitted to urge that it be better to tell the truth.'" (*Case, supra*, 5 Cal.5th at p. 26; *People v. Holloway* (2004) 33 Cal.4th 96, 115 ["'[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.'"].) In contrast, in *Neal* the detective made both a promise and a threat that defendant would be moved closer to home if he cooperated, but he could be charged with first degree murder if he did not. (*Neal, supra*, 31 Cal.4th at pp. 81, 84-85.)

To assess the voluntariness of Jackson's statements, we also consider Jackson's age, education, and experience with the

criminal justice system. (*Winbush, supra*, 2 Cal.5th at p. 452; *Neal*, *supra*, 31 Cal.4th at p. 84.) At the time of the interrogation, Jackson was 22 years old, four years older than the defendant in *Neal*. (*Neal*, at p. 84.) Jackson did not know a lawyer was the same as an attorney, showing a lack of experience with the legal system. However, he knew he had an attorney. In addition, his uncle and mother had advised him that he did not have to talk to the detectives and he could ask for his attorney. There was no evidence Jackson was of low intelligence or uneducated, or that he was unable to understand his rights. By contrast, the defendant in *Neal* had no knowledge of the legal system, had not graduated from continuation high school, was severely neglected as a child, and had low intelligence. (*Ibid*.)

Finally, throughout the interrogation Jackson steadfastly maintained his innocence, which tends to undercut his contention his free will was overborne by the detectives' continued interrogation after he invoked his *Miranda* rights. (*Case, supra*, 5 Cal.5th at p. 26 ["[S]ignificantly, throughout the interrogation defendant steadfastly maintained that he was innocent, which tends to undercut the notion that his free will was overborne by the detective's remarks."]; *People v. Williams* (2010) 49 Cal.4th 405, 444 ["Significantly . . . defendant did not incriminate himself as a result of the officers' remarks. [Citation.] Rather, defendant continued to deny responsibility in the face of the officers' assertions."].)

We conclude Jackson's statements were sufficiently voluntary under the totality of the circumstances such that their admission for impeachment was not in error. (*People v. Spencer, supra*, 5 Cal.5th at p. 672; *Winbush*, *supra*, 2 Cal.5th at p. 452.)

C. *The Trial Court Did Not Have a Sua Sponte Duty To Instruct the Jury on Involuntary Manslaughter*

When a defendant is charged with murder, the trial court has a sua sponte duty to instruct the jury on lesser included offenses, including involuntary manslaughter, if substantial evidence has been presented at trial to support a jury finding of the lesser included offense. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 191; *People v. Smith* (2013) 57 Cal.4th 232, 239 (*Smith*) [even in the absence of a request, a trial court must instruct "'on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged'"].) "The jury's exposure to 'the full range of possible verdicts—not limited by the strategy, ignorance, or mistake of the parties . . . ensure[s] that the verdict is no harsher or more lenient than the evidence merits.'" (*Gonzalez*, at p. 196; accord, *Smith*, at p. 239 ["'[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.'"].)

"'"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser included offense is 'substantial enough to merit consideration' by the jury."'" (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; accord, *People v. Landry* (2016) 2 Cal.5th 52, 96 ["'Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed the lesser, *but not the greater*, offense.'"].) "In this regard, the testimony of a single witness, including that of a defendant, may suffice to require lesser included offense instructions." (*Wyatt*, at

p. 698.) "Courts must assess sufficiency of the evidence without evaluating the credibility of witnesses, for that is a task reserved for the jury." (*Ibid.*)

"On appeal, we independently review whether a trial court erroneously failed to instruct on a lesser included offense" (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; accord, *People v. Nelson* (2016) 1 Cal.5th 513, 538), considering the evidence in the light most favorable to the defendant (*People v. Cortez* (2018) 24 Cal.App.5th 807, 811; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*)).

The trial court instructed the jury on complete self-defense (CALCRIM No. 505), voluntary manslaughter based on heat of passion (CALCRIM No. 570), and imperfect self-defense (CALCRIM No. 571), but not involuntary manslaughter. The court determined there was "insufficient evidence to warrant an instruction on involuntary manslaughter." The trial court explained, "Here, [Jackson] placed the victim in a chokehold; or as the prosecution described it, an 'arm bar' where the victim's neck was placed between the crook of his elbow and significant force was applied by [Jackson] to disable the victim and until the victim could not move and became unconscious. In addition, [Jackson] used his legs to restrain the victim's body as they struggled on the floor. Placing the victim in a chokehold is an assault by means of force likely to produce great bodily injury. [Citation.] Indeed, here the coroner testified that [Herrera] died by strangulation. [¶] [Jackson] intentionally used violent force against the victim until the victim no longer struggled and became unconscious. Based on these actions, it cannot be said that he acted without realizing the risk of death or serious bodily injury."

Jackson contends the trial court erred by failing to instruct the jury on involuntary manslaughter. There are four bases for

involuntary manslaughter. "[S]ection 192, subdivision (b), defines involuntary manslaughter as 'the unlawful killing of a human being without malice' during 'the commission of an unlawful act, not amounting to a felony; or in commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1227; accord, *People v. Abilez* (2007) 41 Cal.4th 472, 515.) In addition, "unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if the felony is committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [trial court should have instructed jury on involuntary manslaughter where defendant, a "self-styled 'healer,'" convinced a cancer patient to undergo alternative treatments that caused his death because practicing medicine without a license is not an inherently dangerous felony], overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 88-91; accord, *People v. Bryant* (2013) 56 Cal.4th 959, 970 (*Bryant*); *Brothers, supra*, 236 Cal.App.4th at p. 31.) Finally, involuntary manslaughter may be based on an unlawful killing in the course of an inherently dangerous assaultive felony without malice. (*Brothers*, at pp. 33-34; see *Bryant*, at p. 970 [Killing "without malice in the commission of an inherently dangerous assaultive felony . . . cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life."].)

Jackson contends the trial court should have instructed the jury on involuntary manslaughter based on the theory he committed a lawful act (self-defense) with criminal negligence or the theory he committed an inherently dangerous assaultive felony without malice. We disagree.

1. *Involuntary manslaughter based on the commission of a lawful act with criminal negligence*

The standard for involuntary manslaughter based on the commission of a lawful act in an unlawful manner without due caution and circumspection is "equivalent" to a standard of criminal negligence. (*People v. Penny* (1955) 44 Cal.2d 861, 879 [criminal negligence standard applied to unlicensed cosmetologist's application of poisonous chemicals to victim's face to remove wrinkles]; *People v. Luo* (2017) 16 Cal.App.5th 663, 670 (*Luo*) [defendant acted with criminal negligence supporting involuntary manslaughter conviction where he supervised construction site, violated safety regulations, and directed victim to work in dangerous work site after city ordered construction to stop].)

"Criminal negligence is defined as conduct that is '"such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to [the] consequences."' [Citation.] Criminal negligence is also described in terms of objective foreseeability, that is, one acts with criminal negligence when a person 'of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm.'" (*Luo, supra*, 16 Cal.App.5th at p. 670; accord, *People v. Butler* (2010) 187 Cal.App.4th 998, 1008.) "[E]ven if the defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant's belief was objectively unreasonable." (*Butler*, at pp. 1008-1009; accord, *Luo*, at p. 671.)

Jackson contends the trial court should have instructed the jury on involuntary manslaughter based on his commission of a lawful act—self-defense—undertaken with criminal negligence, citing to *People v. Villanueva* (2008) 169 Cal.App.4th 41. *Villanueva* is inapposite. In *Villanueva*, the defendant was charged with attempted murder after he brandished a gun at the victim who was sitting in a van, out of fear the victim would harm him, then the defendant fired the gun and injured the victim. (*Id.* at p. 47.) The Court of Appeal concluded there was sufficient evidence the defendant intentionally shot the victim out of fear the victim would hit him with his van, supporting an instruction on self-defense, notwithstanding defendant's testimony that he accidentally shot the victim. (*Id.* at pp. 49, 51.) The court also concluded the trial court should have instructed the jury on the lesser included offense of attempted voluntary manslaughter by means of imperfect self-defense. (*Id.* at pp. 52-53.) Jackson points to a footnote in which the trial court observed that "[i]f the act is done in a criminally negligent manner, the homicide is involuntary manslaughter." (*Id.* at p. 54, fn. 12.) However, the court in *Villanueva* did not reach whether the facts supported an instruction on involuntary manslaughter because, as the court explained, there is no crime of attempted involuntary manslaughter given that an attempt requires a specific intent to commit the crime. (*Ibid.*)

Here, the trial court instructed the jury on both complete and imperfect self-defense. (See CALCRIM No. 505 [complete self-defense]; CALCRIM No. 571 ["A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense."].) Jackson asserts the death of Herrera was an unintentional killing, relying on his testimony he did not intend to hurt or kill Herrera.

But a homicide based on imperfect self-defense is voluntary manslaughter even when it is an unintentional killing if the defendant acts in conscious disregard for life. "[W]hen a defendant, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary, not involuntary, manslaughter." (*People v. Blakeley, supra*, 23 Cal.4th at pp. 88-89.) Had the jury found Jackson acted in reasonable self-defense, it would have acquitted Jackson, rather than convict him of involuntary manslaughter. (*People v. Casares* (2016) 62 Cal.4th 808, 846, citing *People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065 ["self-defense is established when the defendant has an honest and reasonable belief that bodily injury is about to be inflicted on him, provided he uses force no greater than that reasonable under the circumstances"]; CALCRIM No. 505 ["The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. . . ."].)

2. *Involuntary manslaughter based on commission of an inherently dangerous assaultive felony without malice*

In *Bryant*, the Supreme Court held voluntary manslaughter based on a killing in the commission of an inherently dangerous assaultive felony requires either an intent to kill or a conscious disregard for life. (*Bryant, supra*, 56 Cal.4th at p. 970.) In *Brothers*, we reasoned if an unlawful killing committed in the course of an inherently dangerous assaultive felony without malice is not voluntary manslaughter under *Bryant*, it must be involuntary manslaughter. (*Brothers, supra*, 236 Cal.App.4th at pp. 33-34.) We concluded "an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of

an inherently dangerous assaultive felony." (*Id.* at p. 34.) We explained, "[W]hen the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault. [Citations.] However, when . . . the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter. [Citations.] Otherwise, an involuntary manslaughter instruction would be required in every implied malice case regardless of the evidence." (*Id*. at p. 35.)

Jackson contends there was substantial evidence from which the jury could have concluded he committed an inherently dangerous felony assault by placing Herrera in a chokehold, but he acted without express or implied malice. Jackson relies on his testimony he did not intend to hurt or kill Herrera, instead only intending to subdue Herrera. But intent to kill is an element of express, not implied, malice. (§ 188, subd. (a)(1) [Malice "is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature."]; accord, *Bryant, supra*, 56 Cal.4th at pp. 964, 970.) "[M]alice is implied when the defendant engages in an act the natural consequences of which are dangerous to life and acts with conscious disregard for human life." (*Brothers, supra*, 236 Cal.App.4th at p. 34; accord, *Bryant*, at p. 965.)

Here, there was evidence of implied malice because Jackson engaged in an inherently dangerous assault (the chokehold), the chokehold was the "type of aggravated assault the natural consequences of which are dangerous to human life," and there was no evidence Jackson did not "subjectively appreciate[] the danger to human life his . . . conduct posed." (*Brothers, supra*, 236 Cal.App.4th at p. 35.) At the time of his death, Herrera was five feet nine inches tall and weighed 220 pounds. Jackson was six feet one inch tall and weighed approximately 185 pounds. Jackson recently played professional football and was more physically fit than Herrera. Jackson testified that after he chased Herrera into the kitchen, he thought Herrera was reaching for a knife on the kitchen counter, so he grabbed Herrera by the back of his shirt and punched him on the side of the head. Next, Jackson placed his right arm around Herrera's neck and held him in a chokehold, while his left arm braced his right arm. When they fell sideways onto the kitchen floor, Jackson managed to wrap his legs around Herrera. Jackson testified he continued to maintain the chokehold, squeezing Herrera's neck under the chin. Jackson estimated he applied the chokehold for about a minute, and he squeezed Herrera with his arms during the chokehold.[9] He did not

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[9] The People contend Jackson's chokehold fractured the hyoid bone in Herrera's neck, showing that Jackson acted with such force he must have subjectively appreciated the danger to Herrera's life. But it is unclear whether the fracture was caused by the chokehold, the electric cords tied around Herrera's neck, or removal of the neck organs during autopsy. Dr. Young testified he could not say whether the hyoid bone fracture occurred before or after Herrera's death. He testified 13 percent of ligature strangulation cases have hyoid bone fractures, but he admitted he could not tell whether the cords were placed around Herrera's neck

release Herrera from the chokehold until Herrera stopped moving and became unconscious.

Although Jackson testified he did not intend to hurt or kill Herrera, there was no evidence he did not subjectively appreciate the danger his chokehold posed to Herrera's life. Indeed, Jackson's attorney never argued that Jackson did not understand the risk. Instead, in his closing argument Jackson's attorney contended Jackson's actions were justified by self-defense. Moreover, Jackson showed a conscious disregard for life when he left Herrera unconscious on the floor and did not immediately summon help. Jackson did not check on Herrera until after he noticed Herrera was still lying on the ground as he passed through the kitchen to leave the apartment. Under these circumstances, the trial court did not err in refusing to instruct the jury on involuntary manslaughter based on the commission of an inherently dangerous assaultive felony without malice. (*Brothers, supra*, 236 Cal.App.4th at p. 35.)

D. *The Trial Court Did Not Err in Denying the Motion for a Mistrial Based on Spectator Misconduct*

1. *Applicable law*

"Spectator misconduct is a ground for mistrial if it is 'of such character as to prejudice the defendant or influence the verdict.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 368-369 (*Chatman*); accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 965 [same]; *People v. Myles* (2012) 53 Cal.4th 1181, 1215 (*Myles*), quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 572 ["spectator conduct violates the federal Constitution if it is 'so inherently prejudicial as

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before or after his death. In addition, he stated the bone could have fractured during the autopsy.

to pose an unacceptable threat to defendant's right to a fair trial'"].)[10]

"'[B]ecause a spectator does not wear the same cloak of official authority as a prosecutor, most instances of spectator misconduct will likely be more easily curable than those of a prosecutor.'" (*Chatman, supra*, 38 Cal.4th at p. 369.) Whether spectator misconduct "is incurably prejudicial requires a nuanced, fact-based analysis." (*Id.* at pp. 369-370.) "'[I]t is generally assumed that such errors are cured by admonition, unless the record demonstrates the misconduct resulted in a miscarriage of justice.'" (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; accord, *People v. Zielesch* (2009) 179 Cal.App.4th 731, 745 (*Zielesch*) [no error where court admonished jury to disregard spectators wearing commemorative buttons depicting fallen officer's likeness, and to base verdict solely on evidence and not sympathy for the officer]; *People v. Houston* (2005) 130 Cal.App.4th 279, 311, 316 (*Houston*) [trial court's two admonishments cured any inherent prejudice caused by spectators' display of victim's image on buttons and placards].) "Jurors are presumed to follow a court's admonitions and instructions." (*Houston*, at p. 312.)

We review the trial court's denial of a motion for a mistrial based on spectator misconduct for an abuse of discretion. (*People*

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[10] The United States Supreme Court has not addressed whether prejudicial spectator courtroom conduct violates a defendant's right to a fair trial. (*Carey v. Musladin* (2006) 549 U.S. 70, 76 ["the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence"].)

v. Trinh (2014) 59 Cal.4th 216, 251; *Chatman, supra*, 38 Cal.4th at p. 369.) "The trial court has broad discretion to ascertain whether a spectator's actions were prejudicial." (*Myles, supra*, 53 Cal.4th at p. 1215; accord, *Trinh*, at p. 251 [trial court has broad discretion "because it typically is present and 'in the best position to evaluate the impact of such conduct on the fairness of the trial'"].)

2. *Jackson's motion for a mistrial based on spectator misconduct*

Before the trial court instructed the jury, it notified counsel at sidebar that the clerk had asked the bailiff to exclude people wearing black tee shirts that stated, "Justice for Frank Herrera," with Herrera's photograph. Defense counsel noted, "It was the picture used in the case." She observed approximately 13 spectators were wearing the tee shirts. Ten of these spectators walked into the courtroom while the trial court was giving an unrelated jury admonition. At this point the bailiff excused the audience members with the tee shirts.

The trial court then heard argument outside the presence of the jury on what action the trial court should take as to the asserted spectator misconduct. The trial court stated its tentative ruling was to exclude audience members wearing the tee shirts unless they took the shirts off or turned them inside out. Defense counsel contended the spectator conduct was inherently prejudicial, and these spectators were trying to get the jury to base its verdict on sympathy for the victim rather than the evidence. She added, "[I]t's like a bell that cannot be unrung." She argued the message on the shirts was larger than the buttons at issue in *Houston, supra*, 130 Cal.App.4th 279. Defense counsel said she was not asking for a mistrial, but was requesting the spectators "be removed from the courtroom, because they cannot—what they

did was so bad, turning the shirt now inside out does not remedy it."

The trial court stated its intent to admonish the jurors, noting the bailiff had promptly excused the spectators wearing the tee shirts. In addition, the trial court noted most of the jurors were looking at the court—not the spectators who walked in to the courtroom—because the court was giving the jury an admonition at the time the spectators entered. The court then informed the audience members about the local court rule for courtroom behavior, which provides that "[p]ersons in the courtroom, including parties and counsel, shall not indicate by facial expression, shaking of the head, gesturing or shouts, or other conduct, disagreement with or approval of testimony or other evidence given." The court added, "Members of the audience, I do want to admonish all of you, this is a rather emotional trial. If you have—you violate any of these rules with regard to your conduct and/or disrupt it in any way, I'm going to ask the bailiff to excuse you from our proceedings. . . ."

After the jury returned to the courtroom, the trial court admonished them: "[Y]ou may have noticed that some members of the audience were wearing shirts that appeared to depict the victim's photograph on it and some words on the top and bottom of it. [¶] I'm going to remind you and repeat this instruction which I gave to you at the beginning of the trial, and which I will give you at the end of this trial in just a few moments that: [¶] Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that members of the audience were wearing those [tee] shirts is not evidence. I order you to disregard that, and you must not consider this incident in any way during your deliberations."

After the noon recess and outside the presence of the jury, defense counsel moved for a mistrial based on spectator misconduct. The trial court denied the motion. The court agreed to read defense counsel's proposed jury admonition, but refused to include a statement that the spectators engaged in intentional misconduct. After the jurors returned to the courtroom, the trial court admonished them a second time: "I am instructing you that you are not to be influenced by anything you observed this morning nor by any spectators who are allowed to be present for the remainder of this case. If any of you feel that the spectator display did in fact influence you in any way or that the continued spectator presence will influence you in any way, you are to let me know now."

3. *The trial court's denial of Jackson's motion for a mistrial was not an abuse of discretion*

The trial court did not abuse its discretion in denying Jackson's motion for a mistrial. Thirteen spectators wore tee shirts with Herrera's photograph along with the words, "Justice for Frank Herrera." The photograph on the tee shirts had been used during the trial, so the jury had already seen this image. The court clerk noticed these spectators and notified the bailiff, who promptly excused the spectators from the courtroom. The trial court noted most of the jurors were looking at the court, and not the spectators who walked into the courtroom. These spectators were allowed to return to the courtroom only if they removed the tee shirts or turned them inside out. Before the jury returned to the courtroom, the court looked at the audience, and did not see any one wearing the tee shirts.

Further, the court gave the jury two admonitions. In the first admonition, the court ordered the jury to disregard the

audience members wearing the tee shirts and reminded them this was not evidence. The court also instructed the jurors they "must not consider this incident in any way in your deliberations." The second admonition—proposed by defense counsel—instructed the jurors that they were not to be influenced by the presence of the spectators, and that they were to notify the court if the continued spectator presence influenced them in any way. As in *Zielesch* and *Houston*, these admonitions were sufficient to cure any prejudice from the asserted spectator misconduct. (*Zielesch, supra*, 179 Cal.App.4th at p. 745; *Houston, supra*, 130 Cal.App.4th at pp. 311, 316.)

DISPOSITION

The judgment is affirmed.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.